Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
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(2)

No. 88-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOE G. GARCIA, *et al.*,

Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly rule that the principles articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), govern the question whether this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) ("*SAMTA I*"), should be applied retroactively?

2. Did the court of appeals correctly apply the *Chevron Oil* principles in ruling that under the particular facts of this case *SAMTA I* cannot be applied retroactively to the operations of the San Antonio Metropolitan Transit Authority ("SAMTA")?

3. Since Petitioners argued to the court of appeals that it could not apply the *National League* traditional function test in deciding the appeal in this case, can Petitioners now challenge the court of appeals' judgment on the ground that the court failed to determine whether SAMTA's operations are "traditional" under *National League of Cities v. Usery*, 426 U.S. 833 (1976)?

4. Having determined that *SAMTA I* cannot be applied retroactively to SAMTA, was the court of appeals correct in not deciding whether SAMTA's operations are "traditional" under *National League*?

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Respondent respectfully submits that this case does not present any issue worthy of review by this Court and that the petition for certiorari should be denied. In rendering its decision, the Fifth Circuit Court of Appeals correctly applied the well-established principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to the specific facts of this case. The Fifth Circuit's decision does not conflict with any other circuit court decision. Indeed, all three other circuit courts that have addressed this issue have applied *Chevron Oil* in a manner that is consistent with the Fifth Circuit's decision. Furthermore, this case turns on the unique facts and litigation history applicable to the San Antonio Metropolitan Transit Authority. Accordingly, the Fifth Circuit's decision has no significance or policy import beyond the particular facts and parties in this case.

STATEMENT OF THE CASE

A. The *National League of Cities* Decision.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, which extended the FLSA's minimum wage and overtime provisions to state and local government employees, were unconstitutional insofar as they "directly displaced the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." 426 U.S. at 852. The Court did not identify all constitutionally protected state activities, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. The Court expressly overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), and thereby extended constitutional immunity to schools and hospitals. 426 U.S. at 855. The Court made it clear that these listed activities were merely "examples" and were "obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16.

On remand, the trial court in *National League* recognized that this Court's decision left a gray area for future resolution. *National League of Cities v. Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). As a result, on June 24, 1977, the Secretary of Labor issued regulations (29 C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator was to determine those operations against which he would seek to enforce the FLSA. In discussing these regulations, the remand court in *National League* ruled that "[i]n

the event the Labor Department issues a ruling with which plaintiffs or any member of their class disagrees, a court would have jurisdiction to enter such protective order as it may deem appropriate." 429 F. Supp. at 706.

B. The Proceedings Involving SAMTA.

By letter dated September 17, 1979, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System" are not traditional governmental functions under *National League.*[1] On November 21, 1979, SAMTA filed an action against the Secretary of Labor (hereinafter called *"SAMTA I"*) for a declaratory judgment that under *National League* the FLSA's minimum wage and overtime provisions are inapplicable to its operations. Later the same day, SAMTA's operators brought this separate action (*"SAMTA II"*) for violation of the FLSA. The district court stayed *SAMTA II* while *SAMTA I* was litigated.

On November 17, 1981, the district court held in *SAMTA I* that SAMTA's operations are immune under *National League.* On direct appeal, this Court vacated the judgment and remanded for further consideration in light of its intervening decision in *UTU v. Long Island R.R.*, 455 U.S. 678 (1982). *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On February 18, 1983, the district court reentered summary judgment in favor of SAMTA. *San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. 445. The Secretary of Labor and Joe G. Garcia

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[1] Dep't of Labor, Wage and Hour Division., Opinion WH-499, *reprinted in* Wage and Hour Manual (BNA) 91:1138-40.

(who had intervened in *SAMTA I*) both appealed directly to this Court. Rather than deciding whether transit is a traditional governmental function, the Court set the case for reargument on a completely different question—"whether or not the principles of the Tenth Amendment as set forth in *National League* . . . should be reconsidered." *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213 (1984).

On February 19, 1985, this Court overruled *National League* and, on that basis alone, reversed the district court's judgment in *SAMTA I*. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court Majority—like the district court—could find no principled basis on which to distinguish transit from the traditional activities listed in *National League*. The Majority accordingly found "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' " 469 U.S. at 546-47.

Following remand, the parties dismissed *SAMTA I*, thereby ending the Secretary's involvement in the litigation and permitting SAMTA's bus operator employees to assert their claims for retroactive back pay in *SAMTA II*. On February 24, 1987, the district court ruled in *SAMTA II* that this Court's decision in *SAMTA I* could not be applied retroactively to SAMTA's operations, and it accordingly granted summary judgment in favor of SAMTA.[2]

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[2] *Garcia v. San Antonio Metropolitan Transit Auth.*, No. SA-79-CA-458 (W.D. Tex. 1987)(reproduced as Appendix B to Petitioner's Petition for Writ of Certiorari).

On March 9, 1988, the Fifth Circuit Court of Appeals unanimously affirmed the district court's judgment. Following the lead of virtually every other state and federal court to consider the issue, the Fifth Circuit held that the retroactivity issue in this case is controlled by the principles announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

Applying *Chevron Oil*, the Fifth Circuit held that *SAMTA I* overruled the clear past precedent of *National League*. Although *National League* did not specifically identify transit as a traditional function, the court concluded that *National League* provided a "general framework" upon which SAMTA had a right to rely and that SAMTA had "numerous persuasive arguments" that transit was traditional, which were sufficient to convince the district court twice and four members of the Supreme Court in *SAMTA I* that it was performing a traditional function. Pet. 14a.[3] In keeping with the arguments advanced by Petitioners on appeal in that court, the Fifth Circuit held that since this Court had "declared the [*National League*] framework illogical and unworkable," it would be inappropriate for the court to consider whether SAMTA was in fact traditional under the old *National League* doctrine. Pet. 16a. It accordingly concluded that the first prong of *Chevron Oil* was satisfied.

Relying on *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720-21 (1978) and *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d

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[3] The Fifth Circuit's opinion is reported at 838 F.2d 1411. It is reproduced as Appendix A to the Petition for Writ of Certiorari. References in this brief to the Fifth Circuit's decision are cited to the pages in Appendix A.

939, 945 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986), the Fifth Circuit held that retroactivity would not further the operation of the *SAMTA I* holding. It thus concluded that the second prong of the *Chevron Oil* test did not favor retroactivity. Pet. 16a-17a.

With respect to the third part of the *Chevron Oil* test, the Fifth Circuit held that retroactivity would be inequitable. It based this holding on the fact that a backpay award could cripple municipalities' "always closely budgeted municipal funds," and on its conclusion that "the equities do not justify saddling them with huge backpay liabilities when they acted in good faith during all those years, believing for substantial precedential reasons that they were exempt from the FLSA . . . ." Pet. 19a-20a. The court held that a second equity compelling nonretroactivity was the fact that SAMTA's employees had received many other benefits instead of FLSA overtime benefits. Pet. 19a. This was based on the court's finding that "SAMTA has developed its structure of wages and benefits through meetings with the employees' union representative and that this structure included six types of overtime pay, and took into account the nonapplicability of the FLSA's overtime requirements." Pet. 18a.

C. The 1985 FLSA Amendments.

While *SAMTA II* was under consideration, Congress passed the 1985 Amendments to the FLSA. Pub. L. No. 99-150, 99 Stat. 787 (1985)(currently codified, as amended, at 29 U.S.C.A. § 201, *et seq.* (1987)). These Amendments postponed until April 15, 1986 the FLSA's application to state and local activities denominated "traditional" in the Department of Labor regulations. *Id.* § 6. The Amendments intention-

ally took no position on the retroactivity of *SAMTA I* to transit and left that issue for resolution by the courts. See discussion, *infra*, pp. 9-10.

REASONS FOR DENYING THE WRIT

Petitioners' articulated reasons for seeking certiorari do not fit within any of the recognized grounds for invocation of this Court's discretionary jurisdiction. The Fifth Circuit applied settled case law to the facts of this case and properly held that *SAMTA I* is not retroactive. Its decision does not conflict with any other court of appeals decision, nor with any decision of this Court. It involves an issue that was resolved based on the unique facts of this case, which are of importance only to the parties to this action, and it does not deal with a subject that is likely to recur in other cases. Since this case was properly decided and does not fit any of the accepted standards for granting Supreme Court review, the petition for writ of certiorari should be denied.

I. THE FIFTH CIRCUIT PROPERLY APPLIED *CHEVRON OIL* TO THE *SAMTA I* RETROACTIVITY QUESTION.

As their first reason for seeking certiorari, Petitioners assert that *Chevron Oil* established a common law doctrine that cannot be applied to the question of *SAMTA I*'s retroactivity. Petitioners concede that there is no split in the circuits on this issue and that the other circuits that have considered the question have applied *Chevron Oil*.[4] The only direct sup-

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[4] *Ackinclose v. Palm Beach County*, 845 F.2d 931 (11th Cir. 1988); *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986). After the petition was filed in this case, the Ninth Circuit also applied *Chevron Oil* in holding that *SAMTA I* is not retroactive. *Austin v. City of Bisbee*, No. 87-1595 (9th Cir. Aug. 29, 1988).

port Petitioners cite for their common law proposition is the dissenting opinion in *Mineo*, which hardly creates the conflict necessary to merit Supreme Court review.

Petitioners' argument that *Chevron Oil* is inapplicable is based solely on section 10(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259(a). Section 10(a) provides in pertinent part as follows:

> Reliance in future on administrative rulings, etc.—
>
> a. In any action or proceeding based on any act or omission on or after [the date of the enactment of this Act], no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the [FLSA] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in *reliance on any written administrative regulation, order, ruling, approval or interpretation* of ["the administrator of the Wage and Hour Division of the Department of Labor"], or *any administrative practice or enforcement policy* of such agency with respect to the class of employers to which he belongs. [emphasis added]

Section 10(a), on its face, only applies to reliance on regulations, practices and other pronouncements from the Wage and Hour Administrator of the Department of Labor. Section 10(a) does not even purport to address the issue of retroactivity where an employer has relied on a *judicial* decision that is overruled. Petitioners accordingly cannot legitimately contend that section 10(a) precludes application of

Chevron Oil in FLSA actions since it is totally silent on the subject.

The inapplicability of section 10(a) to the retroactivity issue is buttressed by the 1985 Amendments to the FLSA. Public Law No. 99-150, 99 Stat. 787 (1985). These Amendments (§ 2(c)) eliminated retroactive liability for functions determined to be "traditional" in the Department of Labor's regulations, but took no position on the question whether activities deemed nontraditional by the Labor Department should be subject to retroactive liability. In this regard, section 7 of the Amendments provides as follows:

> The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7 or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

The Senate Report unambiguously shows that the purpose of this provision was to assure congressional neutrality on *SAMTA I*'s retroactivity to transit systems:

> The Committee is aware that the question whether transit employees, prior to the decision in *Garcia*, were entitled to FLSA compensation for overtime hours worked is still being litigated in federal court. *The amendments are intended to*

> *protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.*

S. Rep. 159, 99th Cong., 1st Sess. 15, *reprinted in* 1985 U.S. Code Cong. & Ad. News 651, 663 (emphasis added). The House Report contains a similar statement. H.R. Rep. No. 331, 99th Cong., 1st Sess. 27-28 (1985). If Congress intended for section 10(a) to control the retroactivity question, it would not have intentionally reserved resolution of that issue for the courts.

Petitioners erroneously fault the Fifth Circuit for relying on cases in which this Court applied Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) to pension plans and declared its decisions to be nonretroactive.[5] Petitioners contend that these decisions "are simply irrelevant because neither the Constitution nor any statute declares a rule respecting the retroactivity of decisions in these contexts." Pet. 12-13. Petitioners' effort to distinguish these Title VII cases is manifestly wrong because Title VII contains a provision that is almost the mirror image of section 10(a) of the Portal-to-Portal Act. Section 713(b) of Title VII provides as follows:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice *if he pleads and proves that the act or omission complained of was*

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[5] *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

> *in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission* . . . .

42 U.S.C. § 2000e-12(b)(emphasis added). Section 713(b) is "virtually identical" to section 10(a) of the Portal-to-Portal Act. *Spirt v. Teachers Ins. & Annuity Ass'n*, 93 F.R.D. 627, 655 (S.D.N.Y. 1982).

Petitioners' reliance on *Milwaukee v. Illinois*, 451 U.S. 304 (1981) is misplaced. *Milwaukee* involved the question whether preexisting common law could be applied in the face of a federal statute dealing with the very same problem (*i.e.*, overflows from a sewer system). This Court held that the federal common law must yield to the statute:

> There is no "interstice" here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act. Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law.

451 U.S. at 323.

Milwaukee actually supports the Fifth Circuit's decision in this case. In *Milwaukee*, the federal common law and the federal statute dealt with precisely the same subject matter, and the federal law was deemed controlling. In the instant case, section 10(a) of the Portal-to-Portal Act does not address the question of retroactive application of a Supreme Court decision that overruled past precedent, and therefore section 10(a) clearly does not deal with the same subject to

which *Chevron Oil* applies. Petitioners in effect would have this Court rewrite section 10(a) to require retroactive liability where an employer has relied on an overruled Supreme Court decision. Only Congress can perform such a task. *See Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).

As this Court stated in *United States v. Johnson*, 457 U.S. 537 (1982), "*all* questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil* . . . ." *Id.* at 563 (emphasis added). "All questions" include the one in this case.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE *CHEVRON OIL* TEST IN FINDING *SAMTA I* TO BE NONRETROACTIVE.

The insubstantiality of the petition is underscored by the fact that Petitioners have taken a scatter-gun approach and claim that certiorari is required because the Fifth Circuit allegedly erred in applying each and every part of the *Chevron Oil* test. As this section of Respondent's opposition confirms, the Fifth Circuit's treatment of the three *Chevron Oil* factors was clearly correct, it was consistent with other circuit and Supreme Court decisions, and it was tailored to the unique facts of *this* case—all of which demonstrate that the petition for certiorari is groundless.

A. The Fifth Circuit Correctly Held that *SAMTA I* Overruled Clear Past Precedent on Which SAMTA Had Reasonably Relied.

Under the first prong of the *Chevron Oil* test, a decision to be applied nonretroactively must

> establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first

> impression whose resolution was not clearly foreshadowed . . . .

404 U.S. at 106 (citations omitted).[6] In seeking certiorari, Petitioners, in substance, contend that the Fifth Circuit misapplied the first *Chevron Oil* factor because *National League* did not mention transit and therefore SAMTA could not reasonably rely on *National League* in structuring its operations.

Petitioners' contention is plainly wrong. In *National League*, the Court intentionally did not list all activities that it considered traditional. It carefully stated that the specific activities mentioned in its decision were merely "examples" and were "obviously *not an exhaustive catalogue* of the *numerous* line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16 (emphasis added). Since this Court did not attempt to identify all traditional activities, but instead articulated general guidelines, it must have intended for responsible public entities, such as SAMTA, to use *National League* as the framework

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[6] Because this Court's decision in *SAMTA I* overruled clear past precedent, there was no need for the courts below to consider the second, alternative prong of the first part of the *Chevron Oil* test—whether the decision "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106. If the court below had found SAMTA's operations to be nontraditional, *Chevron Oil* would still require a ruling of nonretroactivity since such a decision would involve an issue of first impression that was not foreshadowed by any Fifth Circuit or Supreme Court precedent. *Cf. Ferrell v. Pierce*, 785 F.2d 1372, 1386 (7th Cir. 1986)(district court's decision on issue of first impression held nonretroactive). To this very day, there is no precedent in the Supreme Court or the Fifth Circuit that transit is not traditional.

for determining if they were performing a traditional function. This Court's decision in *National League* thus was a "hard fact[] on which [SAMTA had to] rely in making decisions and in shaping [its] conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973). The Third Circuit captured the essence of this point in *Mineo*:

> Applying *Garcia* retroactively would punish the Port Authority for having made a decision which we agree is based on an accurate assessment of the law at the time such decision was made. In the normal business setting, a party must take action and cannot wait indefinitely for precise judicial resolutions; courts should recognize this fact and not punish unfairly those who engage in reasonable business decision-making.

779 F.2d at 946. *See also Ackinclose v. Palm Beach County*, 845 F.2d 931, 934 (11th Cir. 1988)(overruling of *National League* "signaled 'an abrupt and fundamental shift in doctrine' that established 'an entirely new rule which in effect replaced an older one.' ") (quoting *Hanover Shoe, Inc. v. United Shoe Machine Co.*, 392 U.S. 481, 498 (1968).

The Fifth Circuit held that SAMTA had "numerous persuasive arguments why mass transit should have been categorized as a traditional government function and thus exempted from the FLSA." Pet. 14a. Indeed, SAMTA twice convinced the federal district court that transit is traditional. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964)(retroactivity denied where "respectable authorities, *including the court below*," supported reasonableness of appellant's reliance (emphasis

added)); *Ramey v. Harber*, 589 F.2d 753, 759 (4th Cir. 1978)("If this court could not foresee the [Supreme Court's] decision . . ., we certainly cannot agree that [the defendant] should have anticipated that his actions would be condemned by this new development in constitutional law."). SAMTA likewise convinced four Justices of this Court that transit is traditional, and the Majority of the Court itself could not identify any "organizing principle" on which to distinguish SAMTA's operations from the activities specifically listed as traditional in *National League*.[7] *SAMTA I*, 469 U.S. at 539.

The rationale in this Court's decision in *SAMTA I* itself underscores the reasonableness of SAMTA's reliance on *National League*. The Majority in *SAMTA I* specifically rejected the principal arguments advanced by the Government and Garcia in *SAMTA I* for the proposition that transit is not traditional—*i.e.*, that (1) historically transit has not been provided by state and local governments, (2) transit's receipt of federal funds makes transit nontraditional, and (3) transit is a business activity, subject to regulation when it acts as a market participant. The Majority emphatically disapproved the use of an historical test, stating that "[r]eliance on history as an organizing principle results in linedrawing of the most arbitrary sort." 469 U.S. at 544. In rejecting the argument that receipt of federal funds determines whether the FLSA can constitutionally be applied to state and

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[7] The brief SAMTA filed in this Court in *SAMTA I* on the traditional function issue on February 3, 1984 compares public transit to the activities specifically listed as traditional and shows that transit cannot be distinguished from them on a principled basis.

local governments, the Court noted that the activities exempted in *National League* had also received federal funding, *id.* at 553, and concluded that the constitutionality of the FLSA's application to transit would be unaffected "even had Congress not provided federal funding . . . ." *Id.* at 555 & n.21. Lastly, the Court held that the business/nonbusiness distinction once used in the tax immunity cases was as "unworkable" in the Commerce Clause context as in the field of tax immunity. *Id.* at 543.[8]

B. The Fifth Circuit Correctly Held that Retroactivity Will Not Further the Purpose of the Rule Announced in *SAMTA I* .

The Fifth Circuit's ruling that retroactivity will not further the rule in *SAMTA I* is manifestly correct. The rule in *SAMTA I* can be stated broadly or narrowly. Broadly, the rule is that courts generally cannot review Congress' exercise of its Commerce Power against the States. Narrowly, as construed by the Fifth Circuit, the rule is that state and local governments must comply with the FLSA in the future.

The broad rule will not be advanced by retroactivity because acts of Congress will be nonreviewable by the courts regardless of whether a backpay remedy is extracted through retroactive application of the Court's decision. The narrow rule will not be furthered because backpay awards are unnecessary to compel future FLSA compliance. Since all state and

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[8] The Court thus rejected the principal underpinning for the Deputy Administrator's 1979 transit letter, which relied on obsolete tax cases for its hypothesis that transit is a business activity and therefore not covered by *National League*. Dep't of Labor, Wage and Hour Div., Opinion WH-499 (Sept. 17, 1979), *reprinted in* Wage and Hour Manual (BNA) 91:1138-40.

local governments are now aware that *National League* has been overruled, and that they must comply with the FLSA in the future, "[t]here is no reason to believe that the threat of a backpay award is needed to cause [state and local governments] to amend their practices to conform to [the Supreme Court's decision]." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720-21 (1978).

Since retroactive liability is unnecessary to compel SAMTA's future compliance with the FLSA, the second *Chevron Oil* prong clearly does not favor retroactivity under the facts in this case. The other circuit courts that have considered this question have reached the same conclusion.[9] The fact that Petitioners reject these decisions out of hand and instead rely on a dissent in *Mineo*, 779 F.2d at 954 (Becker, J., dissenting), exposes the weakness of their position.

C. The Fifth Circuit Correctly Held that the Equities in this Case Require Nonretroactivity.

The third prong of the *Chevron Oil* test is whether retroactivity of *SAMTA I* " 'could produce substantial inequitable results . . . .' " *Chevron Oil*, 404 U.S. at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). In the instant case, the Fifth Circuit held that the equities require nonretroactivity because of the substantial, unexpected liability that could befall SAMTA and because of the windfall SAMTA's employees would receive. Pet. 19a-20a.

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[9] *Ackinclose v. Palm Beach County*, 845 F.2d 931, 935 (11th Cir. 1988); *Mineo v. Port Auth. of New York & New Jersey*, 779 F.2d 939, 945 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986). In *Austin v. City of Bisbee*, No. 86-3778 (9th Cir. Aug. 29, 1988), the Ninth Circuit held that "retroactive application" of *SAMTA I* "would actually hinder its prospective application . . . ."

Petitioners' challenge to the Fifth Circuit's holding is based in large part on the unique facts of this particular case. For example, the Fifth Circuit found "compelling the fact that SAMTA has developed its structure of wages and benefits through meetings with the employees' union representative and that this structure included six types of overtime pay, and took into account the nonapplicability of the FLSA's overtime requirements." Pet. 18a. Petitioners attack this finding because public sector collective bargaining is illegal in Texas and the Fifth Circuit's "notion that these were arms-length negotiations" is "illusory." Pet. 21. Petitioners' argument overlooks the detailed, undisputed affidavit of Edward F. Carr, which SAMTA submitted in support of its motion for summary judgment. Mr. Carr's affidavit chronicles the history and content of these meetings and reflects that even though public strikes are illegal in Texas, the union pursued its discussions with SAMTA with such vigor that work stoppages have occurred five times. Mr. Carr's affidavit also supports the Fifth Circuit's finding that SAMTA's wages and benefits have been structured through arrangements with SAMTA's employees' union representative in a manner that assumes the nonapplicability of the FLSA and which provides substantial other benefits. The Fifth Circuit's holding is fully supported by the record evidence. Furthermore, it is consistent with the Third Circuit's decision in *Mineo, supra*, 779 F.2d at 939.

Similarly, the Fifth Circuit's conclusion that the equities favor nonretroactivity because of the substantial burden that would otherwise be placed on the municipal budget is unquestionably supported by the decisions of this Court. *See, e.g., Arizona Governing*

Committee v. Norris, 463 U.S. 1073, 1092 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 721-23 (1978).

III. THE FIFTH CIRCUIT'S FAILURE TO REAPPLY THE *NATIONAL LEAGUE* TEST IN THIS CASE WAS PROPER AND, IN FACT, WAS INVITED BY PETITIONERS' APPELLATE BRIEFS.

As their final basis for seeking certiorari, Petitioners fault the Fifth Circuit for declining to apply a test which this Court held "was illogical and unworkable from the start." Pet. 16a; see *SAMTA I*, 469 U.S. at 546-47. Petitioners fail to disclose that the Fifth Circuit did exactly what Petitioners requested in their briefs to that court.

In their opening brief to the Fifth Circuit, Petitioners argued against any reapplication of the *National League* test to SAMTA's operations:

> It would indeed be a strange principle of federal common law if a district court could use the *Chevron* doctrine to deny application of a Supreme Court decision and reapply to the same parties who had litigated the issues in a companion case a legal standard found unworkable and unacceptable by the Supreme Court. . . .
>
> It is unnecessary to rethink or reapply the "traditional governmental functions" test.

Brief for Appellants pp. 50-51.

In their reply brief in the Fifth Circuit, Petitioners reemphasized their adamant stand that the Fifth Circuit could not reapply the *National League* test to SAMTA's operations:

> No principle of jurisprudence could possibly support the bizarre result that a rationale and ruling reversed by the Supreme Court could be resurrected and enforced by the district court on remand. Indeed, the very attempt to apply the rule in *National League* would require this Court to reverse the *Garcia* rejection of the rule "as unsound in principle and unworkable in practice." 469 U.S. at 546.

Reply Brief for Appellants p. 33.

Since Petitioners argued that the Fifth Circuit could not apply the *National League* test in this case, they cannot now be heard to complain because the Fifth Circuit heeded their plea.[10]

Furthermore, even if Petitioners could complain, there is no cause for reversing the Fifth Circuit's decision. The Fifth Circuit resolved this dispute in a principled manner by concluding that SAMTA reasonably relied on *National League* and had a legitimate basis for determining that its transit operations were a traditional function. Under these circumstances, there was no reason for the court to attempt application of a test which this Court has held is "difficult, if not impossible," to apply. *SAMTA I*, 469 U.S. at 539.

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[10] *See, e.g., Glassman Constr. Co. v. United States*, 421 F.2d 212, 215 & n.3 (4th Cir. 1970)(Appellant "should not now be heard to complain that we did what it asked of us."); *Capella v. Zurich General Acc. Liability Ins. Co.*, 194 F.2d 558, 560 (5th Cir. 1952)("counsel may not invite error and then complain of it"). *See also Poston v. Caraker*, 378 F.2d 439, 442-43 (5th Cir. 1967)("[I]t is too fundamental to require citation that [appellants] must stand or fall here on the issues as presented below. They cannot now invoke what might have been.")

Nor does the Fifth Circuit's decision create a direct conflict with the Third and Eleventh Circuits' decisions in *Mineo* and *Ackinclose*. The Fifth Circuit only held that reapplication of the unworkable *National League* test was inappropriate in analyzing the facts of this case under the first part of the *Chevron Oil* test. Having concluded that *SAMTA I* could not be applied retroactively in this case, the Fifth Circuit did not comment on the question of reapplying the *National League* test to determine whether SAMTA was, in fact, engaged in a traditional function. The court's silence in this regard is not surprising since Petitioners vigorously argued to the Fifth Circuit that it could not reapply a test that had been found unworkable by the Supreme Court. Accordingly, it is reasonable to interpret the Fifth Circuit's silence on this point as nothing more than a decision that it need not address the issue since Petitioners themselves took the position that the test should not be reapplied. The Eleventh Circuit, itself, in *Ackinclose* could "see no direct conflict between the result [it reached] and the . . . opinion of the Fifth Circuit." 845 F.2d at 938 n.6.[11]

Unlike the instant case, the court in *Mineo* was compelled to consider the first part of the test for

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[11] Contrary to the exaggerated claim contained in Petitioner's Petition (p. 23), the Eleventh Circuit in *Ackinclose* did not "severely criticize[] the Fifth Circuit's decision." See 845 F.2d at 938 n.6. In fact, the Eleventh Circuit's footnote suggests that the court believed that the Fifth Circuit decided the retroactivity issue based on the unique facts of this particular case, which as the text shows, included the indisputable fact, indelibly etched in Petitioner's briefs to the Fifth Circuit, that they eschewed reapplication of the *National League* test. Furthermore, the court

immunity under *National League—i.e.*, whether the employer in that case, a bi-state port authority, was in fact a state for purposes of the *National League* rule. The court then mechanically applied the traditional function test; however, its use of the test was a mere formality since the employees in question were detectives and *National League* specifically listed police protection as a traditional activity. The court's application of the traditional function test, accordingly, was unnecessary to its decision.

Even if a conflict were marginally presented by these cases, it would not be the type of "real and embarrassing conflict of opinion," *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951), that is necessary to invoke Supreme Court review. Because the issue is not likely to recur, the alleged conflict is not important. As a result of *SAMTA I*, the traditional function test was a transitory part of our constitutional jurisprudence, and unless it becomes the law again, there is no compelling reason to address its continued viability. Indeed, it would be a strange irony for this Court to grant certiorari because a court of appeals failed to apply the very test which this Court has held is unworkable.

In any event, if the Fifth Circuit had applied *National League* to SAMTA's operations, it could only have concluded that SAMTA is in fact engaged in a traditional activity, just as the district court twice ruled in *SAMTA I*. *See* discussion, *supra* pp. 15-16. *See also* SAMTA's brief on the merits in this Court

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in Ackinclose held that the traditional function test should be applied in evaluating the employer's claim that the 1985 FLSA amendments protected it from backpay liability. No such claim has been made in the instant case.

in *SAMTA I* at pp. 13-46. Its failure to apply the *National League* test, even if erroneous, thus would afford no ground for reversal.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

September 8, 1988

Respectfully submitted,

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